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No. 118.

Brief of Budd, Garland & Garland for Appellee.

# Supreme Court of the United States.

Filed Dec. 10, 1898.

October Term, 1898.

NORTON MARSHALL, Appellant,

*vs.*

PETER T. BURTIS.

No. 118.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

## BRIEF FOR APPELLEE.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1898.

NORTON MARSHALL, Appellant,
*vs.*
PETER T. BURTIS. } No. 118.

**Appeal from the Supreme Court of the Territory of Arizona.**

## BRIEF FOR APPELLEE.

This is an action brought by Burtis, appellee, against Marshall, in the District Court of the Third Judicial District of the Territory of Arizona for the county of Maricopa, to quiet title to lot 1 of Neahr's addition to the city of Phœnix. After usual proceedings of answer, testimony, and trial resulting in favor of Burtis, Marshall appealed to the Supreme Court of the Territory, and on hearing there, the judgment of the trial court was in all things affirmed. (Rec., 71.)

Besides the issues presented by Marshall's demurrer and answer (Rec., 4), he afterwards filed an amended answer, and made it a cross bill, attacking Burtis' deed as invalid, and asserting his right under a deed from the

party who had sold to Burtis some two years previously, and asked relief to set aside Burtis' claim and to establish his own.

The assignment of errors are numerous, but after all, they amount to little if any more than the single and simple assertion that the court erred in finding in favor of Burtis' claim and against Marshall (Rec., 77, 78), and we will not repeat them here, but address ourselves to the point upon the whole record, whether the court did err in giving relief to Burtis instead of to Marshall.

The case was contested most thoroughly by Marshall, as even after the judgment of the Supreme Court, he moved for a rehearing, and this was denied by the Supreme Court. (Rec., 73.) There appears to be no exception saved as to the denial of the petition for rehearing, and the party seems to have, so far as the record is concerned, been content; and there is no assignment of error on this point. So that, granting or refusing motions for new trials and rehearings being largely in the discretion of the court, it would seem there is nothing now before this court. The refusal of the Supreme Court of the Territory to grant a rehearing was the last act or judgment of that court, and there being no question on that presented here, it must be there is an end of the matter.

Steines *v.* Franklin Co., 14 Wall., 22—notes.

Should this position be held untenable, we must now turn to the bill of exceptions, and epitomize that, in order to get at the case in full. But before doing this,

let us observe the bill of exceptions (Rec., 12–68) in the District Court fails to show by averment or by implication that there was no other testimony before the trial court than that contained or set out in the bill of exceptions. This being true, the Supreme Court of Arizona was bound to presume in favor of the correctness of the entire proceedings and affirm the case, if for no other reason. And the absence of this in the bill of exceptions keeps up the presumption in this court, and an affirmance here is required.

Gilmer *v.* Higley, 110 U. S., 47;
Deery *v.* Cray, 5 Wall, 807.

Now to the facts, if we must look at them, as disclosed by the bill of exceptions. We will condense them:

It appears that some years ago David Neahr conveyed to his daughter, Mary Friday Neahr, the land in controversy, conditioned that she should not sell or dispose of the same till she arrived at the age of twenty-one years.

On the 14th day of October, 1892, Mary Friday Neahr conveyed the land to the appellee, having theretofore declared and represented to him that she was twenty-one years of age, and making the same declaration to the notary who took her acknowledgment to the deed. Burtis paid her in cash the full value of the land, the sum of fifteen hundred dollars. Burtis went into possession of the land. In October, 1894, Marshall appeared at the home of Mary Friday Neahr, at Yuma, and after days of coaxing, cajolery, and argument with her, pro-

cured a deed from her of the same land, for the miserable pittance of *one hundred dollars* cash and a promise to pay *two hundred* more when he "shall obtain peaceable possession and unclouded title to the land."

The deed to Burtis was of record. Not only did Marshall have constructive notice of the sale to Burtis but he actually knew of it, and he procured the deed to himself, as he alleged to Mary Neahr and her brother, Freeson, "for the purpose of getting even" on Burtis for purchasing the property in 1892 instead of letting him (Marshall) purchase it *at that time.*

It is conceded that Burtis paid full value for the land, and it is proved beyond question that Mary Neahr represented in October, 1892, that she became twenty-one years old in the month before. Marshall himself at that time believed her to be of age, because the testimony shows that he tried to make the purchase then, and was only prevented because Burtis offered a higher price.

But Marshall wanted to "get even." He desired to prostitute the machinery of the law that he might wreak vengeance on the man that outbid him when he tried to make the purchase in 1892. So, in October, 1894, he procured his deed from the girl. Here we do not find a vendor who, on arriving at full age, voluntarily repudiates a conveyance made by her in infancy, and sells the land for its full value to an innocent and *bona-fide* purchaser. Instead of that we find one who, even if she did not attain her majority till 1894, is satisfied completely and

absolutely with the sale she made in 1892, who declares time and again to Marshall that she is satisfied, that the land was "well sold," and that she has no desire to repudiate the Burtis deed; who does not declare at that time that she was not twenty-one in 1892. But Marshall tells her he can prove by a host of witnesses that she was not twenty-one in 1892, and that he wants her to make a deed to him so he can get even on Burtis, "who played him a dirty trick." (The aforesaid "dirty trick," according to Marshall's and Walker's testimony, being that Marshall wanted to borrow the money from Burtis in 1892 to purchase the land, but Burtis, instead of lending the money to make the purchase, bought the land himself.) The girl, apparently worn out with Marshall's begging for a deed, and tearful protestations that she was not twenty-one in 1892, took his hundred dollars and two-hundred-dollar note, payable in the dim future, and executed the deed to him. She afterward tendered back the money and the note, but he refused to accept it. (Rec., 51.) He then could have made himself "whole" on the transaction, got back his money and note, but he wanted "to get even." He wanted a law suit—and he got it! and we have seen how it prospered and thus far resulted.

One of the contentions made by appellant is that the weight of the testimony shows that Mary Neahr was not twenty-one years of age until September, 1894. Appellant rests his whole case on that proposition. A number of witnesses testified that Mary Neahr was twenty-one years of age in September, 1892, and a number,

composed largely of ignorant persons, who apparently knew no other date in the calendar of time than the year 1873, testified that this was the year in which she was born. One of them, Mrs. Muzzy, knew it because David Neahr boarded that year in her restaurant with his family. One of the Neahr boys contradicted her and declared that the family never boarded elsewhere than at their own home. Another of them, Mrs. Weber, testified that Mary Neahr was born in 1873, because her brother was born in that year, yet she clearly demonstrated on the witness stand that the father of the boy died two years before 1873. And so on down the list.

These witnesses all testified before the court; their testimony was not taken before a referee. The record shows that twenty-one witnesses were examined in the case. Weiger William Neahr, Purdy Freeson Neahr, Mr. Mussy, Mrs. Father Gheldorf, Mrs. Post, Mrs. Downey, Mrs. Silva, Mrs. McIntyre, Mrs. Conception Nailor, Townsend and Brinley testified in open court. There were only three witnesses who testified before the referee, and these testified on other matters.

The cardinal rule governing appellate courts is that where the evidence is conflicting the finding of the lower courts will not be disturbed, and the rule is even broader.

> "Where there is evidence to sustain the decision of the trial court the judgment will be affirmed, although the appellate court might have found otherwise if sitting as a trial court."
>
> Barry *v.* Coughlin, 90 Cal., 220.

The question as to when Mary Neahr arrived at the

age of twenty-one years depends upon the credibility of the various witnesses and the weight to be given to their testimony.

The appellate court will not pass upon the credibility of witnesses who have testified in the trial court.

Olevas *v.* Olevas, 61 Cal., 386;
Hardenburgh *v.* Bacon, 33 Cal., 356.

The rule obtains in equity cases as well as in trials at law.

Donahue *v.* Mariposa L. Co., 66 Cal., 317;
Ruter *v.* Stock, 12 Cal., 402;
Doe *v.* Vallejo, 29 Cal., 385;
Stockman *v.* Riverside Co., 64 Cal., 57.

So we maintain that the evidence as to the age of Mary Neahr being conflicting, this court will not in the exercise merely of its appellate jurisdiction attempt by perusing the transcript to weigh the evidence and retry this cause as though it were a trial court.

Even if Mary Neahr was not twenty-one years of age when she executed the deed to Burtis there are still unsurmountable obstacles in the way of a recovery by Marshall.

Mary Neahr received from Burtis the sum of fifteen hundred dollars for the land sold. She has not, neither has Marshall, returned or offered to return this sum of money or any part thereof. Marshall came into a court of equity and in his cross bill prayed its equitable interposition in its behalf. He seeks equity, but neither he nor his grantor have attempted to do equity. Not only

that he comes in naked of everything that would commend him to a court of equity, he is not an innocent or *bona-fide* purchaser. He took a deed from this girl and for it gave a sum that under his own showing was only one-tenth of the value of the land in 1894; and furthermore, he procured this deed for the avowed and determined purpose of making trouble, annoyance, expense, and cost and litigation to Burtis. Where are the "clean hands" here?

The consideration that Burtis paid should have been restored to him before he could be stripped of the land that he purchased from this girl under her representations that she was of age at the time she received it.

Kilgore *v.* Johnson, 17 Tex., 355;
Stuart *v.* Baker, 17 Tex., 421;
Bingham *v.* Barley, 40 Amer. Rep., 801;
Furgeson *v.* Houston R. Co., 11 S. W. Rep., 347;
Pemberton B. & L. Assn. *v.* Adams, 31 Alt. Rep., 280.

It is no answer to say that Mary Neahr had spent the fifteen hundred dollars and therefore can not return it.

> "It is stated by Chancellor Kent, and announced as a controlling doctrine in many, perhaps a majority of the States, that where a party under the plea of infancy, seeks to avoid an executed contract, he must restore the consideration which he has received. The rule, though broad, is nevertheless one which commends itself to most men as being founded in strict and impartial justice. Its tendency is to enforce honesty in transactions between individuals, and fully in consonance with oft-quoted principle

that the privilege of infancy is to be used as a shield and not as a sword; or in other words, that infancy may and should be protected, but should not be permitted to oppress or injure others. There are cases which apparently militate against the rule, but they are in conflict with the weight of authority and do not represent the now general received opinions of the courts of the country."

2 Warville on Vendors, page 874.

And the same learned author in writing on the proposition that if any infant has spent the consideration her obligation to return it ceases, uses this language:

"It is to be observed, however, that this rule, in most cases where it has been applied, is a rule of law and not of equity. The actions in a majority of cases cited in support of the rule were brought for a recovery of the consideration, the infant having previously elected to disaffirm, and the courts in several instances, while laying down the rule, intimate that if the infant sought a recession in a court of equity he would be required to refund the consideration, whether he had disposed of it or not before he arrived at lawful age."

*Ib.*, page 875.

"An infant is not permitted in equity to enjoy the proceeds of a sale of his property and then repudiate the sale any more than an adult."

Goodman *v.* Winler, 64 Ala., 410, 437;

Commonwealth *v.* Sherman, 18 Penn. St., 346.

Even if Mary Neahr was not of age when she executed the deed to Burtis she represented herself to be so of age, and it was because of these representetions that Burtis,

purchased. Having induced Burtis to make this purchase she is estopped from avoiding the contract.

Pemberton B. & L. Assn. *v.* Adams, 31 Alt. Rep., 280;

Ryan *v.* Grownew, 28 S. W. Rep., 190;

1 Story Eq. Juris. (13th ed.), 385;

2 Pomeroy Eq. Jur. (2d ed.), 945.

In Smithheimer *v.* Eiseman, 7 Bush., 298, the infant made affidavit that she was of age and the purchaser was induced to accept her deed and part with his money, relying on the truthfulness of the facts, and the court said, "The Chancellor could give no relief to appellant without making himself a party to her iniquitous and fraudulent conduct."

Mary Neahr declared she was of age in October, 1892. She so declared to the notary who took her acknowledgment to her deed. She received the consideration, fifteen hundred dollars; she has not returned it. Could she be heard in equity to profit by her action in the premises? Can her grantee, Marshall, be in any better position, more especially as he had full, ample and complete knowledge of the sale to Burtis, and paid but a trifle for his deed and procured it for a wrongful and malicious purpose?

Further, we contend that Mary Neahr, even if she did not arrive at majority until 1894, ratified and confirmed the Burtis deed. If she was an infant in 1892 her deed was not void but merely voidable; there can be no question about that. Now, she could ratify by express words,

by acts and conduct, or by an omission to disaffirm within a reasonable time. Before she conveyed to Marshall by express words she ratified her deed to Burtis. She repeatedly declared that she was satisfied with her transaction with Burtis, that the land had been "well sold," thus clearly showing that she was willing to abide by her former action and not repudiate it. And she never would have repudiated if she had been let alone by Marshall.

> "In short, any word or action from which an infant's assent to the contract may be fairly deduced will be regarded as a confirmation."
>
> Cheshere *v.* Barrett, 17 Amer. Dec., 739.

> "Confirmation of a deed by an infant, which is voidable at his election, need not be by deed. Anything from which his assent after he arrives at age may be fairly inferred will be sufficient to ratify a deed made during infancy."
>
> Wheaton *v.* East, 36 Amer. Dec., 251.

In 2d Kent's Com. (Holmes' 13th ed.), 233–245 (star page), there is a full discussion of this whole subject—as to void and voidable acts of infants; confirming and avoiding contracts; restoration of consideration received if the contract is disaffirmed—and it sustains throughout what we contend for here.

See, also—

1 Parsons' Cont. (8th ed.), 318–323;

*Ib.*, 345–357;

Irvine *v.* Irvine, 9 Wall., 617.

There is nothing further in appellant's assignment of errors that requires any notice, and in conclusion we

maintain that the equities are all with the appellee; he purchased for full value, under the representation of Mary Neahr that she was of full age in 1892, and she herself so testifies that she was of full age in 1892. (Rec., 48–51.) The consideration was not returned to Burtis. He should not be deprived both of his money and his land at the behest of Marshall, who is not a *bona-fide* purchaser; who is not a purchaser for value; who had actual notice of the sale to Burtis; who procured his deed in bad faith; who is attempting to make a court of equity the instrumentality of venting his malice and spleen and spite on Burtis for the purpose of "getting even on him." And the only excuse he gives for this is that Burtis did wrong in purchasing the land in 1892 instead of then lending him money to make the purchase. The testimony shows that Burtis took no advantage of him, for Mary Neahr testified (Transcript, 244) that Burtis wrote to her about purchasing the land before Marshall had agreed to take it. (Rec., 48–51.)

After all, look at it as we may, this is an appeal from the finding on a question of fact: Was Burtis' grantor twenty-one years of age when she executed the deed to him? The trial court so found, and the Supreme Court of Arizona affirmed this finding. This court will not review cases coming up from the Territories on questions of fact. Authorities on this are most numerous, but we will cite only a few of the more recent ones:

Harrison *v.* Perea, 168 U. S., 311;

Karrick *v.* Hannaman, *ib.*, 328;

Holloway *v.* Dunham, 170 U. S., 615;

Young *v.* Amy (decided by Mr. Justice White, May 31, 1898);

William Naeglin and others *v.* Doloritas Martin de Cordoba and others (decided by Mr. Justice Brewer, October 24, 1898).

It is most respectfully submitted, that in any view of this case, the judgment of the Supreme Court of Arizona should be affirmed.

E. P. Budd,
A. H. Garland,
R. C. Garland,
*For Appellee.*